

1 International Criminal Court
2 Trial Chamber II - Courtroom 1
3 Presiding Judge Bruno Cotte, Judge Fatoumata Dembele Diarra and
4 Judge Christine Van den Wyngaert
5 Situation in the Democratic Republic of Congo - ICC-01/04-01/07
6 In the case of the Prosecutor versus Germain Katanga and
7 Mathieu Ngudjolo Chui
8 Trial Hearing
9 Friday, 9 July 2010
10 The hearing starts at 9.06 a.m.
11 (Open session)
12 COURT USHER: All rise. The International Criminal Court is now
13 in session.
14 PRESIDING JUDGE COTTE: (Interpretation) Court is in session.
15 Please be seated.
16 Court Officer, can you please have Witness 418 brought into the
17 courtroom.
18 (The witness entered court)
19 WITNESS: ERIC BACCARD (Recalled)
20 (Witness answered through interpreter)
21 PRESIDING JUDGE COTTE: (Interpretation) Good morning, Witness.
22 Please be seated.
23 The accused persons are present in the courtroom. We can
24 therefore begin. Before giving the floor to Witness 418, the Chamber
25 would like to recall the conditions in which he is coming back to this

1 courtroom.

2 During the hearing of the 22nd of April, 2010, an oral request
3 was made to Witness 418, Dr. Baccard, to produce a supplementary report
4 in light of the X-ray of the leg of Witness 287, bearing number
5 DRC-OTP-1029-0253. An X-ray that the Prosecutor said he received on the
6 24th of November, 2008, that is, after the forensic examination conducted
7 by the witness on the 20th of November. The witness was asked to examine
8 the new X-ray which was performed after his examination and in his
9 absence. He was asked to draw all the medico-legal and scientific
10 consequences and specify whether there is consistency between the X-ray
11 and the external examination conducted on the witness during the forensic
12 examination of November 2008.

13 Upon the suggestion of the witness himself, Dr. Baccard was asked
14 to re-examine the two other X-rays of mediocre quality which could not be
15 examined in a rigorous manner. They were conducted -- or, rather,
16 performed before November 2008, and these were DRC-OTP-1020-0459 received
17 from the witness by the Prosecutor on the 12th of July, 2008, as well as
18 X-ray DRC-OTP-1020-0575, handed over the request of the Prosecutor to the
19 family of the witness by the hospital on the 18th of July, 2008 with a
20 photograph of Witness 287, EVD 098. Reference, French transcript of the
21 22nd of April, 2010, page 83, lines 20 to 25 and 84 and lines 1 and 2.

22 At the request of Mr. Hooper, the witness was also called upon in
23 collaboration with his colleague, the head of the radiologist service of
24 Bronovo Hospital, to produce duplicates of the X-ray, and this was
25 transcript page 78, lines 13 to 23. It was also indicated that the

1 Registry would hand over to the witness the original of the X-ray OTP
2 1029-0253 so that he could take to Bronovo for duplication; transcript,
3 page 81, lines 6 to 25. Once this operation had been concluded, the
4 Witness was asked to hand over the original to the Registry and copies to
5 the OTP and to each of the Defence teams. That makes a total of three
6 duplicates; transcript page 79, lines 7 to 11 in French. A photograph of
7 the X-ray taken in negative was also requested so as to guard against any
8 possible risk of loss; French transcript, page 82, lines 3 to 12. The
9 witness was called upon to submit his additional report before 10th of
10 May, 2010 at 4.00 p.m.; French transcript, page 80, lines 21 and 25.

11 With the leave of the Chamber, this report was actually submitted
12 on the 16th of May, and today Dr. Baccard, Witness 418, is going to
13 present that additional report.

14 Mr. Kilenda for the Defence team of Mathieu Ngudjolo is going to
15 continue with his cross-examination, and Mr. Hooper, transcript of the
16 20th of April, page 77, lines 1 to 6, had stated that at that point he
17 did not wish to continue with his cross-examination, but the Chamber left
18 the door open for him to come back and ask some questions in light of the
19 additional report. The Defence teams would therefore ask their
20 questions, the Prosecutor will do his re-examination, and the Defence
21 teams will make the final observations.

22 So the stage is set. Mr. Witness, it is now time for you to
23 present your additional report which was carried out on the basis of one
24 new X-ray, number 253, and also the two previous X-rays, 459 and 575. Do
25 we agree?

1 THE WITNESS: (Interpretation) Yes, we agree.

2 Mr. President, your Honours, Mr. Prosecutor, counsel, in response
3 to your requests I contacted not the Bronovo hospital but the
4 Westeinde Hospital, and that hospital did not produce duplicates but they
5 proceeded to digitalise the X-ray that the Court Officer had given to me.
6 After having for precautionary reasons produced pictures of the X-ray
7 that had been given to me, that digitalisation was produced rather than
8 duplicates for the following reasons: It is not possible in Holland
9 currently to produce duplicates which are, in fact, photographs of
10 photographs or, to be more specific, negatives of negatives, because all
11 radiology services have moved on to the digital era. This was,
12 therefore, done with the same if not a better level of quality, and the
13 X-rays which were stored in the five CD-ROMs, because, in fact, the
14 hospital handed over five CD-ROMs to me and not three, and they are
15 compatible to the original X-rays handed to me by the Court Officer. So
16 you will have the possibility to analyse them and to have them
17 interpreted in the same conditions by the experts of your choice, and
18 those experts will also have with them the original X-rays.

19 As to my own interpretation, there were several aspects to that.
20 To begin with, in my report, and I believe, Mr. President, I have the
21 possibility to refer to that report, I dwelt on the fact that what I had
22 with me during the preparation of the report were not actually original
23 X-rays but copies that had been posted in the Ringtail system. So these
24 were X-ray images that had been scanned.

25 It is a good thing that we should bear that in mind at this point

1 in time in the life of the ICC. The system that is used in the ICC is
2 not actually adequate for the conservation of X-rays, and I believe this
3 also applies to photographs, because given the volume of storage, this
4 scanning is done at a low resolution. So this leads to a loss of
5 contrast and a loss of definition. This means that if parties wish to
6 refer to X-rays in Ringtail, they would find themselves in the same
7 situation as the one in which I found myself, so these are documents that
8 are not medically and scientifically very useful. It is therefore
9 necessary to either proceed to the examination of the original documents
10 or, and this was the case in this particular instant, I contacted my
11 colleagues of the information and evidence unit, as well as my colleagues
12 in the KBU, so as to agree on a production process that will make it
13 possible to have equality of arms. That is documents circulated to both
14 parties.

15 I was the first victim of an expert for the Prosecution, because
16 the documents in Ringtail were sub-quality. And when you refer to page
17 10 of my report, for the two documents, X-rays 0459 and 0575, there is
18 the photograph in negative here that you will see in the right column
19 under "Original," and the document, which is accessible to all the
20 parties and the court in Ringtail, is also attached there in the middle
21 column under "Ringtail." And you will see there that it is not possible
22 to interpret or analyse this document medically; whereas, it is possible
23 to do such an analysis with an original document, even if the quality is
24 not the very best to be expected from more advanced hospital
25 institutions.

1 That was the first conclusion. The second conclusion is that
2 during the preparation of my report, I did not have the X-rays that I had
3 requested. At the end of my clinical examination, I prescribed those
4 X-rays so as to verify whether there was a projectile remaining in the
5 knee of the witness, because there was a scar which I thought was an
6 entry wound, but there was no exit wound. So there were two
7 possibilities. Either the projectile had been extracted, or it had
8 remained somewhere in the bone. So I requested that X-ray, and for
9 reasons of security and given the compartmentalisation in the OTP, I did
10 not have the possibility to be present during the performance of those
11 X-rays, and unfortunately those X-rays were not given to me even though I
12 had prescribed them. They were simply filed in the system. And during
13 the preparation of my report, I asked to be given the X-rays so that I
14 could consult and analyse them. An investigator simply gave me an ERN
15 number which turned out to correspond to other X-rays, which explains the
16 error made in that ERN number that figures -- that features in my first
17 report. However, this was not very consequential because that Ringtail
18 copy could not be analysed. I therefore did not use it in my report.

19 However, the situation was quite different. After the hearing,
20 after my testimony, when I was able to consult both the X-rays that had
21 been given to the OTP by the victim, as well as the X-rays that I had
22 prescribed, and with your leave I am going to provide comments to -- on
23 those X-rays.

24 The first thing that can be said is that in these two batch of
25 X-rays, the first X-ray, 0459, and the second X-ray, 0575, correspond to

1 the same X-ray with two presentations. That is a front and profile view.

2 On the X-ray that I prescribed, those two views are brought
3 together in the same image and whatever can be seen on one of those
4 X-rays is also visible on the other X-rays.

5 Indications or annotations have been made on the X-rays that were
6 disclosed to the OTP, and these are handwritten annotations.

7 MR. DUTERTRE: (Interpretation) Can I intervene? Given that
8 some of the annotations may identify the persons involved, perhaps we
9 should go into closed session very briefly, and I'm thinking particularly
10 about the two X-rays. There is a name written there, and that is X-ray
11 number 459.

12 PRESIDING JUDGE COTTE: (Interpretation) Witness, please abstain
13 from mentioning that witness. So each party and participant will
14 understand who it is. If you think we -- there is a risk, you can
15 intervene, but Witness 418, Dr. Baccard, will try to rise to the occasion
16 and avoid a problem.

17 THE WITNESS: (Interpretation) Thank you, Mr. President. With
18 regard to the X-ray number 0575, there are handwritten annotations on
19 that X-ray, particularly the letter P, which, as far as I am concerned,
20 means "profile." There are also arrows that were put there with the use
21 of a bold marker which helped to view the foreign bodies, that is by the
22 doctors or surgeons who prescribed or used those X-rays.

23 With regard to the other X-ray, which is 0459, there are also
24 handwritten annotations, including the later capital F, which in the
25 medical domain means the front view. There is also a name, date, and an

1 age that I will not mention. There are also arrows pointing to two
2 foreign bodies, as well as another arrow pointing to the internal face or
3 the internal part of the patella.

4 So this is the summary description that I can give you on these
5 X-rays which, in fact, are the X-rays mentioned in my report, but once
6 again, I had access to these X-rays only through Ringtail, and it was
7 therefore not possible to carry out any type of interpretation.

8 The other X-ray that I had requested is X-ray number 0253, and it
9 was performed under conditions that meet international medical standards;
10 that is, the penetration standards of the X-rays are correct, which makes
11 it possible to analyse the various osseous structures, as well as the
12 foreign bodies. The X-ray axes are adequate. They're frontal and
13 they're perpendicular and also in profile, which makes it possible to
14 locate with precision and certainty the position of the fragments or
15 foreign bodies that are visible on the X-ray.

16 Now, coming back to the heart of the matter, that is the foreign
17 bodies, there is a confirmation that there are foreign bodies of a
18 metallic nature in that knee. This means that the density of those
19 images on the negative -- the negatives are consistent with those that
20 come from metallic objects. So there is no confusion that is possible
21 with plastic, a stone, a calcification, or anything else. So this is
22 certainly a metallic object.

23 On these X-rays, there are two main metallic fragments, as well
24 as two subsidiary smaller fragments which are not always visible on
25 low-quality or mediocre-quality X-rays that were performed prior to my

1 examination, and this is related to the fact that the penetration of the
2 X-rays was much deeper in one case than the other, and so smaller
3 fragment are not visible in those lower-quality X-rays. So in that X-ray
4 that I requested, I identified a foreign body that I indicated would a
5 large A, which is located at the upper extremity of the right tibia. It
6 is in an intra-osseous location as confirmed by the two views of the
7 X-ray. The body is projected to the up every extremity of the tibia, but
8 it is not clear whether it is in front of the tibia, in the tibia, or
9 behind the tibia. We have a profile view here, and when we cross-check
10 the two views, we can confirm that the foreign body is inside the bone.
11 It is even possible to be specific about its penetration zone, taking
12 into account the fact that this is a good-quality X-ray. There is a
13 quite satisfactory definition which makes it possible to see that there
14 is a penetration tunnel, which is very short but which is visible. It is
15 in the form of a clear strip which I can refer to as hypodense and which
16 is bordered by an edging that is hyperdense. This corresponds to the
17 fact that the X-ray was taken at a distance from the injury, and several
18 years later there is a process of osseous reconstruction which clearly
19 shows this penetration trajectory.

20 Considering the quality of that X-ray, it was even possible to
21 determine the intracorporal trajectory while remaining cautious, because
22 this trajectory is determined in relation to the anatomical region, which
23 does not mean that one can extrapolate to the trajectory of the
24 projectile in space. And we referred to an anatomical position of
25 reference, that is on a subject who is standing up and viewed from a

1 frontal position. And if you look at it from that anatomical position,
2 it is possible to say that the intracorporal trajectory is slanting from
3 the top to the bottom, from the front to the back, and very slightly from
4 front to back. That is in relation to the tibia and its axis.

5 If you look at the shape of that fragment, obviously it is not
6 possible to state with absolute certainty that it is a fragment of a
7 projectile. Nevertheless, we are talking about a certain shape,
8 contours, or density that are quite compatible with the fragment of a
9 projectile that is in an isolated manner.

10 What other diagnoses can be mentioned? Well, this could be a
11 fragment from an explosive device or shrapnel. I would not agree with
12 this second hypothesis, because apart from this fragment, there are other
13 fragments, particularly fragment B, and a cluster of other metallic
14 fragments in dotted form. This B fragment is visible from the external
15 view of the middle third of the right thigh, and so that fragment has
16 other fragments that are situated approximately within the same
17 anatomical region of the right thigh.

18 I also try to determine the possible hypothesis regarding the
19 origin of that injury, and I examined two hypotheses. First of all, the
20 hypothesis of a projectile which penetrated the knee and which breaks
21 into fragments after an impact on the bone with an ascending trajectory.

22 These are things that happened, and this is not a hypothesis that
23 I would totally agree with in this case considering the fact that after
24 the external examination, you can see scars that are consistent with the
25 X-ray images.

1 With regard to the first fragment, A, and I carried out a small
2 photographic and X-ray montage indicating the various stages that led me
3 to superimpose those images so as to determine that the scars described
4 in my previous report and the fragments located at the superior extremity
5 of the tibia were located 2 or 3 centimetres away from each other. So
6 they are compatible. And so in the absence of other scars nearby,
7 medical logic leads us to conclude that the scar was the entry wound of
8 this fragment, which is almost on the surface of the skin. If you touch
9 the patella, you'll see that that bone is almost on the surface of the
10 skin, and the difference between the two is about 2 centimetres.

11 If you look at fragment B, I had noted in my previous report that
12 there was also a smaller scar, and this was a smaller scar located in
13 the -- in the internal side of the skin, that is, a few centimetres away
14 from the location of that fragment.

15 I should like to point out that I am not absolutely certain about
16 the conclusion, but I am more in favour of the hypothesis of the
17 penetration of a projectile which is already partially fragmented in the
18 knee. And if I refer myself to what the patient herself told me during
19 the clinical examination, she had told me that she was under a bed, and
20 to me the penetration of an already fragmented projectile is compatible
21 with passing through what we refer to as a secondary screen in
22 ballistics. For example, a bedpost -- a bedpost or another object.

23 So these were the conclusions that I was able to draw from the
24 examination of those two batches of X-rays, the first batch made up of
25 low-quality X-rays and the other X-ray of an excellent quality that made

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1 it possible to carry out an adequate forensic analysis.

2 Thank you, Mr. President.

3 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Witness.

4 Mr. Kilenda, you were putting questions on the 22nd of April when
5 we drew this to a close, and it's over to you again, after which we will
6 hear from Mr. Hooper.

7 MR. KILENDA: (Interpretation) Thank you, your Honour. Your
8 Honours, good morning.

9 Questioned by Mr. Kilenda: (Continued)

10 Q. (Interpretation) Good morning, Witness.

11 A. Good morning.

12 Q. Well, we are now going to continue talking specifically of
13 Witness 287. As you know, this witness enjoys protection measures at the
14 decision of the Chamber, so we will try to avoid mentioning that person's
15 name, which is something you're already doing.

16 Mathieu Ngudjolo's Defence team's concern is quite simply to
17 glean additional information to do with your additional report so that we
18 can have a clear idea in thorough terms as to the work you carried out.
19 Once more, I don't think I'll go on at length, as I would like quite
20 simply to obtain a few elements as further clarifications, and I hope
21 that I will get from you simple answers, keeping them in layman's terms
22 so as to avoid my getting bogged down in medical terminology and
23 controversy, if you're agreeable to that, Doctor.

24 A. Yes, indeed.

25 Q. Let me, first of all, refer to what my right-hand colleague

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1 Dr. Fofe had by way of a discussion recently with Witness 287. I'm
2 referring to transcript number 131 of the 21st of April, 2010, page 9,
3 lines 9 to 25. Professor Fofe is speaking to Witness 287. I'm going to
4 come back to transcript 129, page 60, 61, lines 3 to 5.

5 "Q. Witness, in answer to a question put by the Prosecutor
6 on Monday, last Monday, as to the results of the X-ray that you had taken
7 at the hospital that we're familiar with, and we're for the going to give
8 its name, you gave the following answer and I quote you: 'Yes. The
9 results of the X-ray showed up a bullet in my knee. That bullet had
10 remained within my body. We took the X-rays to the doctor and the doctor
11 operated me on the sixth day.'"

12 Professor Fofe continued:

13 "I would like to put a first question to you for clarification
14 purposes. Was there just one bullet or two bullets in your knee?

15 "A. According to the X-rays, there was just one bullet.

16 "Q. Were you told with a kind of weapon that bullet came
17 from?

18 "A. No.

19 "Q. Was it a bullet from a weapon of war?

20 "A. Yes.

21 "Q. So we understand that the bullet remained within your
22 knee from Monday the 24th of February, 2003, to Saturday, the 1st of
23 March, 2003; is that correct?"

24 And on page 10 of the same transcript, line 1, the answer is
25 given:

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1 "A. Yes, that is correct."

2 On page 12 of that same transcript, 131, of the 21st of April,
3 2010, my colleague Professor Fofe continues his questions to Witness 287,
4 lines 14 to 21, and I quote:

5 "Q. Did you see the bullet that was removed from your knee?
6 Did you personally see it?

7 "A. That bullet was given to my father. I was unwell at
8 that time. That is why it was given to my father. And he told me about
9 the bullet.

10 "Q. Does your father still have that bullet?

11 "A. No. I don't know. I don't know why he would keep that
12 bullet. I don't know, but I don't think he has it any more. At that
13 time, we were fleeing, so I don't think he kept it."

14 Doctor, on the basis of the exchange that I've just referred to,
15 I'd like to put a number of questions to you. Your forensic expert's
16 report on Witness 287, dated 12th of February, 2009, was drafted on the
17 basis of X-rays that made it possible to intervene in operation on the
18 witness in Bunia; is that correct?

19 A. No. I explained at some length that my report was only produced
20 on the basis of clinical examination, because reproduction in Ringtail of
21 the photos or X-rays that were given to me with the ERN number were not
22 usable. So I did not use any X-ray interpretation for my first report,
23 and I want that to be perfectly clear. And that is set down black on
24 white.

25 Q. Thank you. So what was the purpose of the extra X-ray that you

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1 wanted to be made?

2 A. I explained at the start of the presentation of my report that as
3 there was no X-ray available when I made the clinical examination, and
4 given the clinical noting of one scar following surgery without there
5 being any exit wound and without there being any indication of surgical
6 intervention, it was perfectly logical in the circumstances to request a
7 further X-ray to be made to see whether the surgeon had removed the
8 projectile or to see whether there was some or all of the projectile
9 still within the knee of the victim.

10 Q. Thank you. Doctor, could you tell us, if you know, which service
11 ordered the X-ray to be made?

12 A. You're talking about that extra X-ray?

13 Q. Yes, indeed.

14 A. Unfortunately, I didn't have any information as to the hospital
15 unit, the clinic, or the radiology unit where the X-ray was made. I know
16 that it was done in Kinshasa, but once again, for security reasons I was
17 not invited to be present when that X-ray was made. Once again, I did
18 not have it in my possession when I drafted my expert's report, certainly
19 the first version of my report.

20 Q. So you cannot give us the precise physical address of that
21 medical unit where that second X-ray was made.

22 A. That is correct.

23 Q. Thank you, Doctor. Logically speaking, the results of such an
24 X-ray, are they passed on to the prescribing physician such as yourself,
25 or do they go to somebody else?

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1 A. I don't know what the habits are, what the customs are, in the
2 Democratic Republic of Congo in medical term. I don't know what they
3 tend to do. I quite simply regret that as I was the prescribing
4 physician, which doesn't mean the physician dealing with the patient but
5 the prescribing physician for that X-ray, I do regret the fact that the
6 logical conclusion was not drawn. In other words, as I prescribed the
7 X-ray, that it should have been given to me before it was then passed on
8 elsewhere. I should at least have been kept informed of the results.

9 Q. Do I understand correctly that the results went to the
10 Prosecutor?

11 A. Well, in any case, I only now about this during the public
12 hearing during which I was shown the X-ray. I imagine you have all of
13 the information as regards the chain of custody and what happened as
14 regards to the people who transported and recorded that piece of
15 evidence. I certainly did not receive it, and I only came across it
16 during the hearing.

17 Q. So we agree that your forensic report of the 12th of February,
18 2010, 29, that I refer to as the first report, was prepared without the
19 extra X-ray that we've been talking about.

20 A. That is true.

21 Q. Are you certain that at the time it of drafting that report that
22 you did not have in your possession the extra X-ray?

23 A. I thought that the ERN numbers that were given to me corresponded
24 to that X-ray, but given that it was not possible to make any reading of
25 it in view of the deplorable quality of the X-ray, it was not possible

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1 for me to verify this.

2 Q. Thank you. Your additional report, the 14th of May, 2010, that's
3 your second report which was made at the request of the Chamber, shows up
4 on page 4, and let me quote it:

5 "Examination highlights the presence of a foreign body of
6 metallic nature, dimensions of which are small, outside the femoral
7 diaphysis at the middle third together with several small foreign bodies,
8 five or six of them. A larger foreign body than the previous one, which
9 is to be found in the intra-osseous region at the upper extremity of the
10 tibia behind the anterior tibial tuberosity in a median position below
11 the tibial bone."

12 My question is as follows: How do you reconcile the results of
13 this second X-ray that you asked to be made with the apparently total
14 extraction, total removal of the bullet as claimed by Witness 287
15 herself?

16 A. Well, that's a very good question. Perhaps it would be possible
17 to show the reference or the extra X-ray on the screen so that I can
18 comment on it you wish, because in that way I can use the most exact
19 terminology. Otherwise, it would be rather difficult for people who are
20 not versed in medicine to follow fully the explanation in evidence. So
21 perhaps we could have this on the screen, either the X-ray or the CD-ROM.

22 MR. DUTERTRE: (Interpretation) Your Honour, if I may intervene.
23 If we quickly read through what Mr. Kilenda cited himself earlier on,
24 there's no indication that in the witness's mouth any reference was made
25 to the removal of the bullet. The witness, I assume, was under general

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1 anaesthetic. It could hardly have been in a position to observe it
2 herself. So I think it's worth being very precise in quoting the
3 transcript. Otherwise, there's a risk of leading to errors in the
4 answers given by the expert.

5 PRESIDING JUDGE COTTE: (Interpretation) Mr. Kilenda, I think,
6 first of all, if the presentation of this X-ray is going to enable the
7 witness to give you a better answer, then, yes, it has to be shown and he
8 has to be able to comment on it. I think what you want is as full an
9 answer as possible.

10 So, Court Officer, perhaps you could help out unless the witness
11 can bring up the X-ray on the screen himself, but we certainly need it on
12 our screens so that the witness can comment on it so that we can have a
13 brief response. And also, I think Mr. Dutertre's point is perfectly
14 admissible at this stage. It is important that the witness's words, it
15 has not been done so I haven't been able to check it, I don't have the
16 transcript below my eyes, we have to make sure that it is faithfully
17 reproduced.

18 MR. KILENDA: (Interpretation) If I may. In answer to the
19 Prosecutor's point, it's relevant. It's pertinent. I am quite happy to
20 go along with it. I said that it was an extraction, an extract from what
21 had been said by the witness. I wasn't putting words into the witness's
22 mouth, but I do indeed take the point, and other than that I think it's
23 important that Dr. Baccard should be able to see the X-ray on the screen
24 so that he can comment on it.

25 PRESIDING JUDGE COTTE: (Interpretation) I would ask everybody

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1 to remember, and you've been doing very well for ten minutes, all of you,
2 that you should allow five seconds between each intervention.

3 Court Officer, could you show the X-ray on the screen, please.

4 COURT OFFICER: (Interpretation) Yes, your Honour. But before
5 showing the X-ray, I'd like to know the level of confidentiality. Is it
6 public?

7 PRESIDING JUDGE COTTE: (Interpretation) Is there anything on
8 the X-ray that would identify individual or do we just have a tibia and a
9 knee?

10 THE WITNESS: (Interpretation) Well, it means what you mean by
11 identify. Clearly if we take another X-ray of the knee of the victim and
12 we compare it with what we're going to see on the screen, locating and
13 showing the shape of the fragment, the position of the different
14 fragments, on the basis of comparison it would be possible to see that
15 it's one and the same person, but there is no annotation that would
16 identify the person. All that we have is the number, 287. That is all
17 that is seen. And if the Court agrees, I would comment on that extra
18 X-ray, which is better in quality, and in this way I can answer
19 Mr. Kilenda's question.

20 If the Court wishes, or if the parties wish me to show the
21 situation of the fragments on the initial X-rays, then, yes, it will be
22 necessary to respect confidentiality because there are elements that
23 would identify the person, the name, the age, and there's a date given as
24 well.

25 PRESIDING JUDGE COTTE: (Interpretation) Right. Well as regards

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1 the first X-ray, we will remain in open session, and I think,
2 Court Officer, because you wanted to know what was the degree of
3 confidentiality, I think we can say it's a public document.

4 COURT OFFICER: (Interpretation) In order to see this, please
5 press "PC 1."

6 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
7 Court Officer.

8 The accused, can you see this on the screen? Fine.

9 THE WITNESS: (Interpretation) Yes, your Honour. I shall move
10 to 253.

11 On the screen you can see the X-ray that was carried out
12 following my clinical examination. I will use the cursor so that you can
13 see the different areas and the different fragments. The arrow, as you
14 doubtless know, is on the tibia. We have here the paranea. Here we have
15 the patella from the front and the diaphysis, which is the body of the
16 femur, the femoral diaphysis. And here we have the tibial plates and
17 what we call the tibial spine here. It's the right knee. The arrow
18 shows the inner part, and here's the outer part. Here you have the
19 thigh, and here you have the calf.

20 So it's from the front. And here you have the side view, the
21 profile. You see the same anatomical structure, the patella, the femoral
22 area, the tibia, the tibial plane, the paranea, which is slightly to the
23 back. And here what we refer to as the anterior tibial tuberosity to
24 which the patella tendon is attached.

25 Here you have the front, here you have the back, and here you

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1 have the thigh and below it the calf.

2 So the two main fragments that we note are here, A, and B up
3 here. It is possible to see far more clearly that there are other
4 smaller metallic fragment that we would see more clearly if we were to
5 zoom in. If we consider the volume of the main fragment, we have two
6 views, and it seems to be more significant in profile, whereas it is very
7 flat and deformed in the front view. It is very likely that we don't
8 have the -- all of the projectile here. So there is part of the
9 projectile that did not remain within the knee.

10 Here at the top we have very small fragments that don't really
11 count for much in the volume and the mass of the projectile. It is
12 perfectly possible, from a medical point of view, that part of the
13 projectile was removed, just as it is possible that part of the
14 projectile, if we do away with assumption of fragmentation through the
15 bullet passing through a secondary screen and penetration of an already
16 fragmented bullet, it is possible that one of the fragments did not
17 penetrate, and here I'm opening the range of different hypotheses, what I
18 am saying in answer to Mr. Kilenda's question is that here we probably do
19 not have the entire projectile.

20 What is the nature of the projectile? I would be far less
21 affirmative than what I have heard from elsewhere. There's nothing that
22 allows me to say that it's the projectile of a weapon of war.
23 Admittedly, in wounds caused by weapons of war, and here the term is very
24 broad and very vague, one can come across projectiles from weapons of war
25 that would give this type of fragment. It is consistent, but I have no

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1 degree of certainty that would allow me to confirm this.

2 Once again, I am not an arms and munitions expert, and as for
3 fragmented projectiles, other than certain very specific aspects, I think
4 we should refrain from drawing overhasty conclusions.

5 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Witness.

6 Mr. Kilenda, would you please proceed as you have now received
7 the answer to your question.

8 MR. KILENDA: (Interpretation) Thank you, Your Honour.

9 Q. Is it possible, Doctor, to tell us without any risk to the health
10 of a patient, and certainly without any consequences to that person's
11 life, if it is possible to have for seven years a foreign body in one's
12 body?

13 A. Counsel, yes, this is quite possible. It is certainly possible,
14 and I would also clarify for your information that it could be the source
15 of discomfort. What comes in mind is in the case of a medical
16 examination which you've heard spoken about called IRM, magnetic
17 resonance imagery, this is an indication thereof, the fact of having a
18 metallic foreign body in one's body. This is an indication, an MRI
19 indication, because they use a very powerful device, and this is one of
20 the questions that's asked which aims to establish if the person did have
21 a projectile or a pacemaker, et cetera.

22 And the second example, which is perhaps even better example,
23 well, it's better to know with regards to this victim, because the
24 projectile might cause a pathology which is called satelisme, and this is
25 when you have -- basically, it's made of lead, the projectile. And you

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1 have the CDC, this is a centre, centre of diseases control it's called,
2 this is a centre which deals with that, and in the framework of satelisme
3 this is poisoning, lead poisoning that is not of a professional origin,
4 and it points to a large number of such lead poisoning when it's caused
5 by projectiles. And I don't have any statistics in this regard, but I
6 think it does vary year by year from 5 to 10 per cent of incidents of
7 lead poisoning which is caused by projectiles.

8 So it is true that in most cases everything goes very well, but
9 it is no less true, indeed, that one could advise this injured person if
10 they show symptoms which could indicate lead poisoning to have a -- to
11 look at the level of lead in the urine and blood with a view to
12 eliminating this risk, but in most cases everything goes very well and
13 the bone grows again when -- or it closes again, and this projectile is
14 then isolated from the rest of the body.

15 Q. Scientifically, is it possible to measure the dimensions of this
16 foreign body in the second X-ray?

17 A. No, with the X-ray, yes, but -- yes with a scanner. You can't do
18 it by X-ray. Why not? Because what's going to be missing here is a
19 reference test, like mark a benchmark. I'll just explain this very
20 quickly. You have X-rays which are generated by a bulb, and this bulb
21 has divergent effects, so what does this mean? This means that, in fact,
22 you're going to have a factor of error with regards to the measurements
23 that are made, because you don't know exactly what the corrective factor
24 is that needs to be applied.

25 Now, with a scanner, it's different because you can measure quite

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1 exactly the size of a projectile. However, having said that, the
2 interest in doing so will be quite minor compared with the present case,
3 because if it's a very deformed fragment, then the measuring won't be so
4 useful in -- to determine what type of projectile it was.

5 Q. Can I hope, Doctor, that an expert who's so qualified as yourself
6 in wound ballistics would have come to the same conclusion, another
7 expert with the same qualifications, with regard to this witness? Would
8 another expert like yourself have come to the same conclusions?

9 A. Which conclusions are you talking about, throughout my reports,
10 all of my reports?

11 Q. Dr. Baccard, I don't think that this --

12 MR. DUTERTRE: (Interpretation) This is completely speculative.

13 THE WITNESS: (Interpretation) I don't want to make the sin of
14 pride here with regard to my profession, but I was very measured. I was
15 very prudent in the first report. We spoke about it for a long time,
16 Counsel, and in the second as well. In the second, as the Prosecutor
17 said, we're not in speculation. We are looking at facts. It is clear
18 there is something that can be shown by the X-ray. This person was not
19 born with this metal fragment in the body. There are certain
20 characteristics thereof, which makes it possible to conclude that it is
21 compatible with projectile fragments from a firearm, taking into account
22 that this fragment is situated, I would say, 2 centimetres. This is an
23 estimation from the scar. You don't have to be clairvoyant in order to
24 draw a conclusion. I would say it's obvious. In medical terms, this is
25 a very simple case.

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1 MR. KILENDA: (Interpretation)

2 Q. Thank you very much, Doctor.

3 A. Thank you.

4 Q. Thank you for all the clarifications that you've given us.

5 MR. KILENDA: (Interpretation) Your Honour, I've finished with
6 the witness, and would I like to thank you.

7 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
8 Counsel Kilenda.

9 Counsel Hooper or Counsel O'Shea. I don't know which of you
10 would like to take the floor.

11 MR. HOOPER: Perhaps both of us. I don't know. No, I merely
12 thank the witness for his very clear exposition and my congratulations to
13 the English interpreters for keeping up with the medical vocabulary as
14 well as they did.

15 PRESIDING JUDGE COTTE: (Interpretation) Thanks, which the court
16 would like to add to. Counsel O'Shea.

17 MR. O'SHEA: (Previous translation continues)... President.

18 Questioned by Mr. O'Shea:

19 Q. Good morning, Dr. Baccard.

20 A. Good morning.

21 Q. Dr. Baccard, I -- I -- first of all, I'd like to apologise for
22 not being here when I was supposed to be here. I was one of those people
23 who -- who wound themselves stuck because of the volcano cloud, which
24 explains why we didn't meet again.

25 I don't -- I don't have many questions for you, but would I like

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1 to ask you this: With regard to these fragments which are found in the
2 bone, would it be correct to say that metallic fragments of this nature
3 could stay in the body of a person for their lifetime?

4 A. That is true, Counsel.

5 Q. After death?

6 A. Oh, yes, definitely, Counsel.

7 Q. So the conclusions that you reached in your original report with
8 regard to the timing of this incident stand, do they? They remain the
9 same?

10 A. Absolutely. These conclusions were based on the background and
11 the history and development of the scar.

12 MR. O'SHEA: Yes. Thank you, your Honours. Those are all my
13 questions.

14 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
15 Counsel O'Shea.

16 Prosecutor, at this stage would you like to carry out
17 re-examination? You have the floor.

18 MR. DUTERTRE: (Interpretation) Thank you very much, your
19 Honour, your Honours.

20 Further Questioned by Mr. Dutertre:

21 Q. (Interpretation) Quite briefly, I would have to say there is a
22 point, Dr. Baccard, in answer to a question from Professor Fofe with
23 regards to your presence, or not, when the X-rays were taken, 1029-253,
24 you replied, and here I quote you, that you were not present and that was
25 for security reasons. Could you tell us what security reasons there were

1 for you not being present during this examination?

2 A. I'm not able, Prosecutor, to give any kind of judgement with
3 regard to the level of security or the risk to security of the witness
4 of -- that my presence might have caused. The explanation given to me
5 and what I noted, or at least what I believe, is that having a European
6 doctor accompanying an African victim to a hospital or a clinic or an
7 X-ray centre which Africans go to would have compromised the low profile
8 of this victim, and I can quite see that. But I'm not able to give an
9 assessment with regards to the potential risk to the person.

10 I understand what was said to me, and that's what I am reporting
11 on.

12 MR. DUTERTRE: (Interpretation) A point of clarification, your
13 Honour, this just to indicate that this X-ray -- it's not a question,
14 this X-ray DRC-OTP-1029-0253, which was collected on the 24th of
15 November, 2008, was registered here in the Prosecution vault on the 15th
16 of December, 2008, having come from Kinshasa, obviously.

17 I have no more questions. I would just like to draw the
18 attention of the Chamber to the fact that the additional report, as well
19 as the three X-rays and the photograph used by Dr. Baccard, could
20 usefully be given an EVD number. Also, for quality reasons, the DVD that
21 was made with regards to the scanning or the digitisation of the X-rays
22 on DVD, it's possible that one can better see the photographs than what
23 you see in the printed versions and in the written additional report.

24 PRESIDING JUDGE COTTE: (Interpretation) To be very clear and
25 just to ensure that we have a good comprehension of your request. So

1 we're talking about the three X-rays, 253, 459, and 515, that was after
2 the hearing in April, the ones that are good quality and which are a
3 support for the additional report of Dr. Baccard; is that right? Is that
4 what we're talking about? So I understood that correctly, but it's
5 important to state that. Providing an EVD is necessary. On the other
6 hand, I do not see what you are speaking about when you speak about a
7 photograph which was used by Dr. Baccard. What photograph is this?

8 MR. DUTERTRE: (Interpretation) This was in the introduction
9 stage, yes. I was going to give ERN numbers. The photograph
10 DRC-OTP-1029-061. On page 2 in the additional report it's mentioned, and
11 it's used, for example, on page 13 by Dr. Baccard. It is on the list of
12 incriminating evidence. There's no difficulty in that regard.

13 PRESIDING JUDGE COTTE: (Interpretation) Yes. Page 13. You are
14 correct. This is a photograph where you can see a whole leg. Yes.

15 Where it concerns these four documents, an EVD number has been
16 given. We'll just give some clarifications with regard to the DVD.

17 MR. DUTERTRE: (Interpretation) Perhaps, your Honour, concerning
18 the public nature of this, perhaps the verification X-ray can be public,
19 but we should be prudent if we put the two other X-rays -- or at least
20 we -- we should do it in the same way as the other reports that were
21 given. I think there should be a parallel there.

22 PRESIDING JUDGE COTTE: (Interpretation) Court Officer, please,
23 therefore, could you give the number to it with the appropriate level of
24 confidentiality pertaining thereto.

25 THE INTERPRETER: Microphone. Microphone of the Court Officer

1 isn't on.

2 PRESIDING JUDGE COTTE: (No interpretation). (Interpretation)
3 You can use my microphone. You might have to turn your back to the
4 audience in the gallery, but at least you can use mine. Please don't be
5 afraid of using my microphone.

6 COURT OFFICER: (Interpretation) Thank you, your Honour. The
7 additional report of the witness will have the number EVD-OTP-00124, and
8 it will be registered as confidential.

9 X-ray DRC-OTP-1029-0253 will have the number EVD-OTP-00125, and
10 it will be registered as public.

11 X-ray DRC-OTP-1020-0575 will have the number EVD-OTP-00126. This
12 it will be registered as confidential.

13 The X-ray with the number DRC-OTP-1020-0459 will have the number
14 EVD-OTP-00127. It will be registered as confidential.

15 PRESIDING JUDGE COTTE: (Interpretation) Thank you. So there's
16 still the DVD. I'm sorry.

17 COURT OFFICER: (Interpretation) Lastly, the photograph,
18 DRC-OTP-1028-0061, will have the number EVD-OTP-00128.

19 And, Prosecutor, could you confirm the level of confidentiality
20 of the photograph?

21 MR. DUTERTRE: (Interpretation) I think it can be made public.
22 There's no particular mentions thereon.

23 PRESIDING JUDGE COTTE: (Interpretation) Prosecutor, just
24 additional information where it concerns the DVD. Could you remind us
25 what DVD we're talking about? Is it the one which was made afterwards?

1 MR. DUTERTRE: (Interpretation) Yes. Knowing that you have
2 X-rays and photographs on there which appear with a better quality than
3 in the written report. That's why it is so useful. There are different
4 X-rays and there are identifying elements thereon, which is why it all
5 has to be confidential.

6 PRESIDING JUDGE COTTE: (Interpretation) Please give an EVD
7 number to this documentation, and then we would ask the two Defence teams
8 if they have any final observations to make.

9 COURT OFFICER: (Interpretation) I'm sorry, Prosecutor, but the
10 X-ray contained in the DVD, is that not the one that I mentioned?

11 MR. DUTERTRE: (Interpretation) I'm just standing for something
12 else, but perhaps I got up too quickly.

13 PRESIDING JUDGE COTTE: (Interpretation) Yes, but,
14 Court Officer -- the Court Officer asked you a question. She wanted to
15 know if the X-rays contained in the DVD were not those which she had
16 given an EVD number to. You spoke about a different presentation and the
17 fact that they were in digital form in the DVD. I think Dr. Baccard can
18 confirm that this DVD has the -- has the photographs and X-rays therein.
19 Therefore, it's necessary to clarify this point.

20 You have the -- well, a question was put to you, Prosecutor.

21 MR. DUTERTRE: (Interpretation) Just a comment that I wanted to
22 make with regards to the quality of what appears in Ringtail and the
23 issue of equality of arms.

24 Obviously, the Defence always consults the original exhibits in
25 the Prosecution vault. That's something people can come and do, so we

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1 can ensure equality of arms if people make an appointment to do so.

2 PRESIDING JUDGE COTTE: (Interpretation) Thank you very much for
3 this clarification, Prosecutor, for this reminder.

4 Counsel Hooper, Counsel O'Shea, do you have any final comments
5 which you would like to make while the witness is with us?

6 MR. HOOPER: No thank you, Mr. President.

7 PRESIDING JUDGE COTTE: (Interpretation) Thank you,
8 Counsel Hooper.

9 Counsel Kilenda?

10 MR. KILENDA: (Interpretation) Just one question, your Honour.
11 Just one question.

12 Further Questioned by Mr. Kilenda:

13 Q. (Interpretation) Dr. Baccard, could you tell us if you are
14 really certain that the verification X-ray was really done on the witness
15 287, this X-ray?

16 A. This is a difficult question, not having personally participated
17 in the taking of this X-ray, but I do note two things. Firstly is that
18 the X-ray does have written on it the number 287, which does refer to
19 somebody whose number was 287. And secondly, if I compare, despite the
20 difference, the X-rays of the first group and those which were made under
21 controlled settings, then would I note that at the anatomical level the
22 form of the bones and the position of the fragments are identical, and
23 that is why I stated my point with regards to possible identification
24 using these X-rays carried out for verification purposes in the future.

25 MR. KILENDA: (Interpretation) I've really finished, Doctor.

1 Thank you very much.

2 Thank you, your Honour.

3 PRESIDING JUDGE COTTE: (Interpretation) Thank you,

4 Counsel Kilenda.

5 Witness, the Court would like to thank you. You've come on three
6 occasions before us -- four occasions, in fact. Problems with the
7 timetable, also problems with clouds, which made your appearance more
8 complex than initially envisaged. Thank you very much for your
9 contribution, for the clarity of the responses that you have given to the
10 questions that were put to you, and you are therefore free to leave.

11 Court Officer, Usher, if you could kindly escort the witness out
12 of the courtroom. Thank you very much.

13 Good-bye, Witness.

14 (The witness withdrew)

15 PRESIDING JUDGE COTTE: (Interpretation) As agreed yesterday
16 morning, we are going to continue with the status conference that was
17 initially scheduled for this afternoon. It will not take place this
18 afternoon, but we have to suspend. I am proposing that we reconvene at
19 11.00 a.m., which will permit us to conclude rapidly.

20 Mr. Hooper, please.

21 MR. HOOPER: I'm sorry to interrupt, yes. Before we move into
22 status conference issues, there's one or two the matters that it would be
23 appropriate, I think, for me to raise now.

24 First of all, in respect of disclosure of audio and/or visual
25 records of interview with Witness 219, I think we've now submitted a

1 written submission in respect of that, and I think at the end of that
2 submission we reflect that it would be helpful for us, if there is to be
3 such disclosure, that we get our hands on that material a little before
4 the recess before the end of next week. That would be helpful to us.

5 The second matter is this: Intermediary 143, the Chamber will
6 be, and I'm sure we're all aware, that there were dramatic events
7 yesterday in Trial Chamber I that directly concerns issues relating to
8 Witness or intermediary 143. This Chamber is aware that we have
9 requested disclosure of the identification and other details relating to
10 intermediary 143, and for good reason, because he is a significant player
11 between witnesses that come to stand and speak against Germain Katanga
12 and -- and the Prosecution.

13 In particular, as this Chamber has become aware, he was, as we
14 understand it and as it's been conceded by the Prosecution, the principal
15 intermediary amongst several of these witnesses and in particular, for
16 example, 279 and 280. The Defence were handicapped in their
17 cross-examination of those two witnesses because we were not in a
18 position to go into details in respect of the position of 143.

19 I should also add that intermediary 143 was the introductory
20 agent in respect of our current witness, 267.

21 Our original request for disclosure was back on the 18th of
22 August last year, wrapped as it were -- as it was then in a request for
23 redactions to be lifted in respect of a statement. I'm talking here of
24 filing 1402. This matter, in fact, came to be crystallized in a formal
25 filing made by us. I think that was filing 2150 on the 4th of January of

1 this year. That was a filing, in fact, before, I think, Trial Chamber I.

2 The position as it developed was this, that because there were
3 parallel and similar issues between this Chamber and Trial Chamber I and
4 the Lubanga case there, that effectively disclosure in a way became
5 conditional on what occurred in Trial Chamber I. This was quite logical,
6 because they were essentially seized of that matter, and so we all, as it
7 were, deferred to Trial Chamber I to resolve the issue. In a way, the
8 matter was placed in their hands, and we all agreed essentially that we
9 would march in step with whatever occurred there.

10 What we, the Defence, perhaps didn't appreciate, and indeed I
11 suspect nor did you, the Chamber, was, in fact, what was going on, what
12 was happening in respect of the conduct of the Prosecutor in that case, a
13 Prosecutor, incidentally, that of course we share. There is but one
14 Prosecutor at the ICC.

15 Because of the failure of the Prosecutor to fulfil a judicial
16 order or judicial orders made recently, coupled with a demonstration as
17 perceived or identified by Trial Chamber I of the Prosecutor's
18 intransigent behaviour, that is general intransigent behaviour on the
19 issue, Trial Chamber I issued a stay of proceedings in the Lubanga case
20 which is a very dramatic turn of events indeed, and reading that
21 judgement it appears to us - and events in the future may prove this
22 reading to be wrong - that this may well be a permanent stay in effect.
23 Whether it's a permanent stay or whether trial proceedings will be
24 renewed in the future, is for us now perhaps irrelevant.

25 What is significant is that as far as the disclosure of the

1 identification of intermediary 143 is concerned, that Trial Chamber I is
2 no longer occupied with that concern because of the stay, and so we can
3 no longer look for resolution of that matter, as I perceive we all were,
4 from Trial Chamber I, because they've in effect given up on it. They've
5 exhausted their efforts.

6 So I must renew today, this morning, a request of this Chamber
7 that it order the Prosecutor forthwith, immediately today, to disclose to
8 us the disclosure material that we request, the identification of
9 intermediary 143. We submit that this Chamber, being aware of the
10 history of this, these events in Trial Chamber I, will have little cause,
11 in our respectful submission, to hesitate in respect of that order,
12 bearing in mind that history and bearing in mind its knowledge of the
13 importance of intermediary 143's position in this case. Indeed, as far
14 as I know, we were requesting disclosure before that matter became an
15 issue in Trial Chamber I.

16 So this is not an idle request, and nor is it made, as it were,
17 in the light of dramatic -- the dramatic situation that arose yesterday,
18 but a necessary request in the light of what happened yesterday, and
19 that's my application.

20 PRESIDING JUDGE COTTE: (Interpretation) Thank you, Mr. Hooper.

21 Referring to the filing relating to Witness 219, which we did
22 indeed receive yesterday, we noted that you wanted a decision, if
23 possible, before the judicial recess. So if it is possible, we will
24 respond before that time. If not, then we will respond as quickly as
25 possible.

1 Regarding intermediary 143, we were also suddenly informed of the
2 decision taken by Trial Chamber I yesterday. We also read the decision,
3 and so far we have not had the opportunity to have any comments regarding
4 the intentions of Trial Chamber I. Will the stay of proceedings be of a
5 long duration or will it be brief? We do not know. The only thing that
6 we know is that so far the treatment of the issue of the disclosure of
7 intermediary 143 is the responsibility of Trial Chamber I, which is
8 occupying itself with that.

9 On several occasions, we have exchanged ideas on that point and
10 informed you frequently that we were closely following up what was going
11 on in TC I. The principle of disclosure was actually accepted, but what
12 was remaining was the protective measures that had to be decided in
13 favour of that intermediary 143. We were hoping to have a rapid solution
14 that would make it possible for you to carry out your cross-examinations
15 effectively.

16 We learned, like you, that there was a difficulty in Trial
17 Chamber I linked to an order to disclose the identity of this witness to
18 a number of specified persons and within a specified context; that is,
19 the conduct of the cross-examination of a witness. Apparently, this led
20 to the decision that you have mentioned. And as we have been doing for
21 many weeks now, we are going to try to obtain further information from
22 Trial Chamber I, but please, as you have requested, do not expect us to
23 issue an order today to disclose the identity of intermediary 143. We
24 need to have a minimum of contact with the Chamber that is currently
25 seized with this issue, and we really do not know how long that stay of

1 proceedings will last.

2 In that decision, the Chamber decided that they reserved the
3 right to deal with certain issues, and I do not quite remember, so it is
4 not out of the question that the more general issue of the disclosure of
5 the identity of Witness -- or intermediary 143, to the extent that it
6 also concerns our Chamber, will not be discussed or public.

7 MR. DUTERTRE: (Interpretation) I wanted to be able to say a few
8 words regarding this very important issue.

9 On the first point, Mr. President, your Honours, the disclosure
10 of recordings, the Prosecution also needs time to prepare a response.

11 PRESIDING JUDGE COTTE: (Interpretation) I believe,
12 Mr. Prosecutor, that we should reduce the deadline of 21 days that is
13 normally applicable, and I'm informing you about that right now.

14 MR. DUTERTRE: (Interpretation) What is implicitly requested by
15 Mr. Hooper was not possible.

16 PRESIDING JUDGE COTTE: (Interpretation) Mr. MacDonald indicated
17 yesterday that you have a problem, but by e-mail during the day we are
18 going to give you a new deadline to submit your observations so that we
19 should be able to respond as quickly as possible to the Defence of
20 Mr. Katanga.

21 Now, move on to intermediary 143.

22 MR. DUTERTRE: (Interpretation) First of all, a general
23 observation. The situation of the case in our Trial Chamber is quite
24 different from what is happening in Trial Chamber I. I do not think that
25 we should have the inadvertent impression that yesterday specific

1 difficulties in that case really should affect our case in a similar way.
2 The Trial Chamber I is still seized of the situation, and I believe it is
3 premature for us to expect any decision regarding the application of
4 Mr. Hooper immediately.

5 I would like to say that the Defence of Mathieu Ngudjolo, or
6 Mr. Hooper himself, could actually ask the witness, that is Witness 267,
7 on the general conditions in which he acted without mentioning the name
8 of the intermediary. They will have the answers that they wish to
9 elicit, and this does not necessitate the disclosure of the identity of
10 the intermediary. We did that in the past, and it is quite possible to
11 do so now. In other words, Trial Chamber I will take the decision that
12 it will take, and for the time being it is not urgent for
13 Trial Chamber II to react.

14 PRESIDING JUDGE COTTE: (Interpretation) Mr. Hooper, you wanted
15 the floor again?

16 MR. HOOPER: Just to say in respect of the 219, the first matter,
17 I hear my friend say that they need time to form a response. This is a
18 request that was made in February of this year, a simple request, and we
19 see no reason for any delay whatsoever and compelling reasons that the
20 matter be expedited, because we are coming up to the recess. We know
21 what that involves for all of us, and if these are audiotapes of several
22 days of interview with no transcript, it's going to take -- and
23 presumably in a language I do not speak, then -- then this is going to
24 take some significant work by somebody to put in a form which I can
25 utilise. That's the first thing.

1 Secondly, what we must very much bear in mind, in my respectful
2 submission, in respect of the way in which the issue of the disclosure of
3 intermediary 143 has developed in Trial Chamber I is, firstly, that we
4 have largely and patiently placed ourselves in the hands of Trial Chamber
5 I to resolve this issue. Secondly, that Trial Chamber I has clearly
6 behaved in a fully proper and judicial manner in approaching the problems
7 that confronted it. Thirdly, that it made a specific order on several
8 occasions to the Prosecutor to disclose to that Defence
9 intermediary 143's identification and it wasn't done. And we know it had
10 been permitted to be disclosed to 1 -- to the Defence in that particular
11 case, I can safely say it would have been disclosed to us. And we are
12 just waiting, in fact, and had been awaiting the resolution of the
13 protective measures issue.

14 Trial Chamber I has decided that that is not an obstacle to
15 disclosure, and indeed I see in the contents of the order made yesterday
16 that Trial Chamber makes reference to having consulted WVS as to risk,
17 which the Prosecution were stating was imminent and great as far as 143
18 was concerned, and WVS said there was no such risk, an echo of similar
19 things that we've heard in the course of this case in other situations.

20 We currently have a witness who is yet another product of the
21 efforts of intermediary 143. We can give undertakings at this stage over
22 the next few days, for example, that if disclosure is made to us that we
23 will confine it to team members here in The Hague, first of all.
24 Secondly that, we won't use it for investigatory needs and will use it
25 solely for our needs in respect of the current witness. But in saying

1 that, I must emphasise that it's investigatory needs that are the
2 compelling reason, of course, for having disclosure of that name, and we
3 have been put on hold now for eight months in respect to that.

4 So it's in the light of the decision by Trial Chamber I to order
5 disclosure on several occasions, to overstep the issue of -- eventually
6 to overstep the issue of the victim -- the victim risk and the like that
7 makes disclosure now so compelling and immediate, in our submission.

8 Now, having said that, of course we appreciate that what happened
9 yesterday was perhaps as much a surprise to this Chamber as it was to --
10 to us, but I can only stress our -- our concern that the Prosecutor is
11 not, in fact, obeying court orders.

12 PRESIDING JUDGE COTTE: (Interpretation) Professor Fofe, please.

13 MR. FOFE: (Interpretation) Thank you, Mr. President. I would
14 like to support the application made by our learned colleague Mr. Hooper
15 while underscoring two elements.

16 The first point, Mr. President, is as follows: In this situation
17 in which we find ourselves, it is important to put things in perspective;
18 that is, distinguish between the *modus vivendi* between the two Trial
19 Chambers, Trial Chamber I and Trial Chamber II, on the one hand, and on
20 the other hand, the principle of the autonomy of our Trial Chamber.
21 Trial Chamber II is not subsidiary to Trial Chamber I. That is the
22 principle.

23 PRESIDING JUDGE COTTE: (Interpretation) Thank you for reminding
24 us about that, Professor Fofe. Please be aware that we know that.

25 MR. FOFE: (Interpretation) I apologise, Mr. President, if the

1 Chamber got the wrong impression, but we had to make a point of
2 underscoring that aspect.

3 The second point that we would like to emphasise is that
4 intermediary 143, and we may be mistaken, is turning out to be an
5 important factor in the investigations carried out in the field by the
6 Prosecutor. And in order for us to have the essential information
7 necessary for us to conduct our cross-examination, it is important for
8 the Defence to have the disclosure requested, because the presentation of
9 Prosecution evidence has gone quite far, and it so happens that many
10 Prosecution witnesses have been contacted by this intermediary, and these
11 are important witnesses such as 279, 280, and 267. It is indeed
12 necessary for the Defence to have disclosure of this identity as
13 requested, and the earlier the better, Mr. President, your Honours.

14 I apologise once again if the Chamber had a wrong impression of
15 my initial statement, but since we are in open session, we thought it was
16 necessary to reiterate this autonomy of the Trial Chamber II.

17 PRESIDING JUDGE COTTE: (Interpretation) Professor Fofe, the
18 Chamber did not take your comment badly. We simply wanted to point out
19 that if two Trial Chambers are seized of the same issue at the same time,
20 we should not arrive at different conclusions. I think there is a
21 regulation in the Regulation of the Court that indicates that the Chamber
22 that is seized first should resolve the problem, and if the Chamber,
23 Chamber I, reaches a decision, they have to inform us immediately.

24 Mr. Prosecutor.

25 MR. DUTERTRE: (Interpretation) Thank you, Mr. President. Two

1 preliminary observations. In the French translation, I heard Mr. Hooper
2 saying that 267 is the product of the efforts of the intermediary. I do
3 not think that that is an appropriate formulation, so I object to that
4 phrase "fruit of the efforts" or "product of the efforts." And maybe
5 it's a problem of interpretation.

6 Secondly, the Prosecutor perfectly complies with the orders
7 issued by Trial Chamber II, and I wanted to specifically point that out.

8 Now, regarding the merits of the issue, it is extremely complex.
9 Trial Chamber I is seized of this matter. There are important
10 implications involved in terms of security, and since each Chamber is
11 autonomous, it seems to me, however, that the need for co-ordination
12 should make us abstain from taking an immediate decision to disclose in
13 this case. And I would like to repeat that the Defence, when it comes to
14 the witness on the stand right now, they can cross-examine him without
15 using the name and without having access to the name at this point.

16 PRESIDING JUDGE COTTE: (Interpretation) Mr. Hooper.

17 MR. HOOPER: (Previous translation continues)... time. Can I
18 just correct something I said or make clear something I said. The first
19 filing was filing 1402 in respect of redactions. There was then your
20 decision 1483, whether we intended to seize TC I about W143, and our
21 filing of filing 2150, that's the 4th -- sorry, the 6th of October, 2009,
22 which was our request before Trial Chamber I for disclosure of the
23 identity of P-143. So we've been before that Chamber, that's clear, and,
24 as you say, both Chambers then became effectively seized of it; but it
25 seems now that Trial Chamber I has stayed all these issues. I say

1 "stayed all these issues." Stayed, of course, that process, and so we
2 have to look to this Chamber for relief.

3 PRESIDING JUDGE COTTE: (Interpretation) Fine. We shall
4 interrupt, and we shall reconvene at 11.30. (No interpretation)

5 The hearing ends at 11.04 a.m.

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